1

Supreme Court, U.S.
FILED

No. 05-710 NOV 23 2005

OFFICE OF THE CLERK

IN THE

United States Supreme Court

ROBERT F. FRIEMANN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

LAW OFFICE OF
JOSEPH W. RYAN, JR.
Attorney for Petitioner
190 EAB Plaza, 15th Floor
Uniondale, New York 11556
516-663-6515

QUESTIONS PRESENTED

This case presents two issues of importance to the district courts of the nation in administering criminal cases under the requirements of the Speedy Trial Act:

1. Can there be a waiver by means other than that authorized by the statute? More particularly, did the courts below err in holding that petitioner had "waived" his right to a speedy trial?

2. Is a violation of the Act subject to harmless error analysis on the view that dismissal would have been without prejudice and that the defendant would have been re-indicted?

3. Assuming "harmless error" analysis is applicable to the Act, was that test improperly applied in this case?

TABLE OF CONTENTS

	Page No.
Question Presented	i
Table of Contents	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	5
Reasons for Granting the Writ	14
A. *The Waiver Issue*	
1. There is a split in the circuits as to whether and to what extent a defendant can under the Speedy Trial Act waive his Speedy Trial rights which warrants this Court's granting review in this case	15
2. There was in this case no sufficient factual basis for the finding of waiver that the Court of Appeals made	18

Page No.

B. *The Harmless Error Issue*

1. The Court of Appeals' holding that "harmless" error analysis was applicable to this case conflicts with the plain language of the Speedy Trial Act and what this statute's legislative history reveals was the intention of Congress in enacting it 20

2. The District Court's failure to dismiss the charges against petitioner was not "harmless error" 23

Conclusion 27

TABLE OF AUTHORITIES

Cases: **Page No.**

Greenup v. United States, 401 F.3d 758, 764, Nos. 03-6530, 03-6580 (6th Cir. Mar. 29, 2005), *ordered unpublished* (6th Cir. June 2, 2005), *reh'g en banc denied* (6th Cir. Aug. 2, 2005) 16

New York v. Hill, 528 U.S. 110 (2000) 18, 19

United States v. Blackwell, 12 F.3d 44, 48 (5th Cir. 1994) 16

United States v. Carrasquillo, 667 F.2d 382, 391 (3d Cir. 1981) 16

United States v. Gambino, 59 F.3d 353 (2nd Cir. 1995) 11, 12

United States v. Janik, 723 F.2d 573 (7th Cir. 1983) 22

United States v. Keith, 42 F.3d 234 (4th Cir. 1994) 16

United States v. Kucik, 909 F.2d 206 (7th Cir. 1990) 16

United States v. Olson, 546 U.S. ___ (November 8, 2005), No. 04-759, Slip Op. at p. 3 24

United States v. Pasquale, 25 F.3d 948, 951-52 (10th Cir. 1994) 16

United States v. Pringle, 751 F.2d 419 (1st Cir. 1984) 16

Page No.

United States v. Ramirez-Cortez, 213 F.3d 1149, 1154 (9th Cir. 2000)..... 16

United States v. Ray, 768 F.2d 991, 998 n.11 (8th Cir. 1985), *overruled on other grounds*... 16

United States v. Taylor, 487 U.S. 326 (1988)..... 20

United States v. Willis, 958 F.2d 60 (5th Cir. 1992)..... 15

United States v. Zedner, 401 F.3d 36 (2nd Cir. 2005) Pet. For Cert. pending No. 05-5992 ..... 11, 12

UNITED STATES STATUTES:

18 U.S.C. Section 3161 ..... 2, 17

18 U.S.C. Section 3162 4

28 U.S.C. Section 1254 2

28 U.S.C. Section 1291 2

28 U.S.C. Section 2111 ..... 5, 20

Rule 52 of Federal Rules of Criminal Procedures 1974 U.S. Code Cong. and Adm. News United States Attorney Manual 5, 20

1974 U.S. Code and Adm. News..... 25

No. 05-0000

IN THE

United States Supreme Court

OCTOBER TERM, 2005

ROBERT F. FRIEMANN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The decision and order of the United States Court of Appeals for the Second Circuit here sought to be reviewed is an unpublished summary order, a copy of which is reproduced in the Appendix to this Petition (1a). The District Court's order and memorandum decision explaining its reasons for denying petitioner's motion to dismiss on speedy trial grounds is unpublished. A copy of that opinion is reproduced in the Appendix (103a).

JURISDICTION

The decision and order sought to be reviewed was entered on June 17, 2005. By order entered September 6, 2005, the Court of Appeals denied petitioner's timely petition for rehearing (8a). This petition is being filed within 90 days of that date.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1). The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

18 United States Code § 3161 provides, in relevant part:

Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practical time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c) (1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

* * * *

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

* * * *

(8) (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attornev for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding

that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

18 United States Code § 3162 provides, in part:

Sanctions

(a) (1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) *If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant.* The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the

dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. *Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.*(Emphasis added)

28 United States Code § 2111

Harmless Error

On hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Rule 52 of the Federal Rules of Criminal Procedure provides, in relevant part:

Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

Statement of the Case

At all relevant times petitioner was a New York State licensed Certified Public Accountant whose practice included business consulting advice.

Petitioner's Indictment

On October 26, 2001, petitioner was indicted, along with certain of his accounting clients and others, in a forty-six count indictment charging the named defendants with, *inter alia*, conspiracy, bribery, fraud, and money-laundering in connection with the obtaining of contracts for Beneficial Plan Administrators, Inc. (hereinafter "BPA") to administer health care plans for the County of Nassau, N.Y.

The original indictment was superseded several times. Indictment S-2 added income tax fraud charges against petitioner. By the end of December 2002 all co-defendants had pled guilty with the exception of Alt t Isernio, CEO of BPA, Michael Agoglia, an employee of BPA, and petitioner.

On December 20, 2002, the District Court granted petitioner's motion to have the BPA conspiracy charges and the tax charges tried separately, but denied his motion to have his trial severed from that of Messrs. Isernio and Agoglia on the BPA conspiracy.

The District Court Severance Order

On January 15, 2003, during jury selection for the then proposed joint trial of petitioner and co-defendants Isernio and Agoglia on indictment S-2, the District Court, with the government's consent, granted petitioner's renewed